APPENDIX A

Statutes Involved

Section 1(b) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717(b), (52 Stat. 821) provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 7(b) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(b), (52 Stat. 824), provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Section 7(c) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(c), (52 Stat. 824, 56 Stat. 83) provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any

proposed construction or extension shall engage in the transportation or sale of natural-gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations

for which the issuance of a certificate will not be required in the public interest."

Section 7(e) of the Natural Gas Act, as amended, Title 15, U.S.C., Section 717f(e), (52 Stat. 824, 56 Stat. 83) provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,799

J. M. HUBER CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued June 18, 1956

Before MARIS and MCLAUGHLIN, *Circuit Judges*, and VAN DUSEN, *District Judge*.

Opinion of the Court

(Filed August 31, 1956)

By MCLAUGHLIN, *Circuit Judge*.

Petitioner, a New Jersey corporation, produces and gathers natural gas from twelve fields in Carson County, Texas, part of the West Panhandle Field. Gas from eleven of the fields flows into a T shaped control system of three valves. The stem of the "T" consists of two feet of pipe and a valve with which intervenor Northern's pipeline connects. Since April 21, 1936, Huber has been selling gas

from those fields under a contract, (as amended) to Northern at the connecting delivery point at well head pressures. Northern transports the gas to its main line transmission facilities where it continues on in interstate commerce transmission until delivered for consumption to ultimate customers or is sold for resale to ultimate customers. The contract is for the life of petitioner's leasehold interests in the producing acreage and as long as gas is taken from it in paying quantities. The remaining time under the contract terms is estimated at approximately ten years.

On June 7, 1954, the Supreme Court in Phillips Petroleum Co. v. Wisconsin, et al., 347 U.S. 672, held that an independent natural gas producer who, though not engaged in the interstate transmission of gas from the producing fields to consumer markets, does sell to interstate pipeline transmission companies which transport and resell the gas to consumers and local distributing companies in various states, is a "natural gas company" within the meaning of the Natural Gas Act, 15 U.S.C. Sec. 717 et seq. As a result, the Commission prescribed regulations covering such companies. Petitioner, under protest, complying with these, filed an application for a certificate of public convenience and necessity under Section 7(a) of the Act covering its sales to Northern. It also filed its contract with Northern as a rate schedule under Section 4(c), together with a notice to Northern of cancellation of that agreement. The ground for cancellation alleged that the Commission has established a price for Huber's gas less than the contract price with Northern which permitted Huber to invoke the escape clause in the agreement.[1] The Commission rejected

[1] The agreement between Huber and Northern allowed the former to add to the purchase price of the gas any Texas production tax. It also gave Huber the right to cancel if a government regulatory body establishes a purchase price less than that of the contract. The Texas production tax was increased on September 1, 1954. Huber claimed that Commission Order 174-A prevented it from

the notice " * * * in so far as it purports to effect an abandonment of a sale or service subject to the jurisdiction of the Commission without express permission and approval first had and obtained as required by Section (7) of the Natural Gas Act * * *." Prior to the hearing Huber filed a "Withdrawal" of its application for the certificate which stated that if this is not allowed it wished to amend its application, setting out that it is "not willing to do the acts and perform the service proposed and is not willing to conform to the provisions of Section 7(e) of the Natural Gas Act and the requirements, rules and regulations of the Federal Power Commission thereunder, and under the provisions of said Section 7(e) of the Natural Gas Act it is mandatory that the Federal Power Commission deny this application for certificate. J. M. Huber Corporation is not willing to accept a certificate covering the sale previously described herein with or without conditions appended to the issuance thereof. Huber is willing eo instante, upon denial of this application by the Commission, to cease delivering natural gas to Northern Natural Gas Company." Following completion of the hearings Huber filed a withdrawal of its notice of cancellation of the rate schedule based on its Northern contract. It stated that it was taking this action because it had erroneously assumed its sale to Northern was within the jurisdiction of the Commission.

Prior to any decision in the matter Huber advised the Commission it was terminating deliveries to Northern

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receiving the amount of the increase from Northern and the latter from paying it. Acting on that theory Huber served Northern with a notice of cancellation, effective March 1, 1955.

The claim is without merit. The Commission has never reduced the price of the gas below the terms of the contract. Huber has simply refused to follow the mechanics of obtaining Commission approval to add the increased state tax to the Northern purchase price. See Section 154.94 of the Regulations of the Commission adopted under its Order 174-A. It is not denied that without exception, the Commission has granted all rate-increase proposals by independent producers which were based on increased Texas-gross-production tax payments.

March 10, 1955. The Commission obtained a temporary restraining order against the threatened move in the United States District Court, District of New Jersey and thereafter in that suit Huber was enjoined from discontinuing its sales for resale to Northern pending final Commission decision in the present issue.[2] Appeal from that decision is pending before us.

The decision of the Presiding Examiner in this cause was filed June 14, 1955. It held that on February 7, 1942 Huber was engaged in the sale of natural gas subject to the jurisdiction of the Commission over the routes described in its application for a certificate of public convenience and necessity and exhibits attached thereto, and has so operated since that time; that the sale of gas from the eleven wells is made in interstate commerce and subject to the jurisdiction of the Commission; that the T valve and pipe system above referred to are necessary Huber facilities for the sale of the gas from the said wells; that the sale together with the operation of the said facilities is subject to Section 7(c) of the Act and of Part 157 of the Commission's regulations; that the Huber gas supply underlying the eleven wells acreage is not so depleted as to render unwarranted further sales by means of the referred to facilities and that neither present nor future public convenience and necessity permits the abandonment by Huber of said facilities or the sale rendered by means of such facilities.

By an appropriate order (subject to review by the Commission), filed at the same time, a certificate of public convenience and necessity was issued to Huber and its application to abandon its sale of natural gas to Northern was denied, except as it related to the twelfth well which is not material to this litigation. Permission to abandon the T system facilities was also refused. On October 6, 1955 the Commission affirmed the decision in its entirety. An order

[2] 133 F.Supp. 479, 488 (D.C.D.N.J. August 16, 1955).

denying the application for rehearing was issued November 29, 1955. The petition for review was thereafter filed.

The Phillips decision makes it very clear that Huber is a natural gas company directly within the jurisdiction of the Commission under the Act by reason of its sale of natural gas to Northern, admittedly a sale in interstate commerce of natural gas for resale. Huber would seem to accede to the jurisdictional view for its attempt to cancel the Northern contract, as has been noted, was based upon the Commission's action in its 174-A order which Huber claimed established a price for the contract gas less than the amount fixed by the contract itself. In so doing, Huber recognized the right of the Commission to control the price of the gas. That the cancellation maneuver was not justified and for its own purposes in no way detracts from Huber's plain acceptance of the authority of the Commission. Irrespective of that, in almost identical circumstances the Supreme Court held Phillips, just such an independent natural gas producer, to be a "natural gas company" within the Act and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of, and rate regulation by the Commission. In that action as here the contention was made that the sales by Phillips were apart of the "production or gathering of natural gas" and controlled by the second clause of Section 1(b) of the Act which provides that the authority of the Commission does not extend "to the production or gathering of natural gas." The Commission had found that the sales by Phillips were part of the production and gathering process or at least an exempt incident thereof but the Supreme Court at page 678 flatly rejected that position saying:

> "We are of the opinion, however, that the finding is without adequate basis in law and that production and gathering, in the sense that those terms are used in § 1(b) end before the sales by Phillips occur."

The first clause of Section 1(b) of the Act establishes its application "to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use and to natural-gas companies engaged in such transportation or sale * * *." And the Supreme Court said in Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 690-691 (1947) regarding the jurisdiction thus conferred that "Exceptions to the primary grant of jurisdiction in the section are to be strictly construed." The assertion that the sale to Northern is part of Huber's gathering process and consequently not controlled by the Commission is almost identical with the unsuccessful argument urged in that cause by Interstate.

The suggestion that the legislative history shows that Congress intended to regulate only the interstate pipelines and that the Northern sale should be construed as an integral part of Huber's business of producing and gathering was also advanced in Phillips. The Court significantly and sweepingly disposed of that thought by saying:

> "Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

And at page 685 the Court laid down the general guiding principle with reference to the type of sale by an independent producer with which we are dealing in this petition. The court said:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation

> of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. Federal Power Commission v. Hope Natural Gas Co., supra, at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

Though admitting that its T valve system facilities are used in its sale to Northern and that there can be no sale unless the seller's and the buyer's facilities connect, Huber seeks to derive some support for the theory that its valves and pipe segment are gathering facilities from the Interstate opinion, supra, but that decision specifically stated at page 691, "It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may be in some degree affected." There, the producer petitioner, like Huber, insisted its sales were a portion of the gathering operation. The court found it unnecessary to resolve the question of just where the gathering process concluded, whether at the place of sale or at some point prior to surrender of custody and passage of title. It held, page 692 simply and effectively that "By the time the sales are consummated, nothing further in the gathering process remains to be done."[3]

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[3] Two other decisions cited by petitioner do not affect the instant issue. Connecticut Light and Power Co. v. Federal Power Commission, 324 U.S. 515 (1945) involved local distribution and Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) concerned the sale of gas leaseholds.

The Commission has found that the Huber's T valve system, its valves and the pipe, are facilities which are used to effect the sale of natural gas to Northern. This is a fact finding supported not only by substantial evidence on the whole case but, if not accepted by Huber, certainly not credibly contradicted. The Phillips decision makes such facilities, sales facilities. These are within the Commission's jurisdiction by Section 7(c) of the Act which reads:

> "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:"

And Section 7(b) of the Act directly prohibits the abandonment of those facilities except by means of the designated procedure which was not followed by Huber. The section reads:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

For all of the above reasons, the Commission in its order of October 6, 1955 denying Huber's application to

abandon its Northern contract, was within its jurisdiction under the Act.

While the above disposes of the basic problem in this appeal there are several minor points that should be passed upon.

Huber attacks the certificate allowed it under Section 7(c), maintaining that since it did not apply for the certificate within ninety days of February 7, 1942, the effective date of the amendment to Section 7(c), as called for by that amendment, there was no authority in the Commission to allow it.

We are satisfied the certificate was properly issued. The 1942 amendment to Section 7(c) prohibited all gas companies from engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission "unless there is in force with respect to such natural gas companies a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The amendment further provided in its "grandfather clause" that as to companies so engaged on the effective date of the amendment the Commission would issue certificates for the particular route or routes without further proof of public convenience and necessity if applied for within ninety days after the effective date of the amendatory Act. But it was not until after the Phillips decision in 1954, and by reason thereof, that the Commission declared its jurisdiction over independent natural gas producers similar to Huber and by amendments to its Rules and Regulations required them on and after June 7, 1954 to obtain certificates covering transportation and sale of natural gas under the jurisdiction of the Commission. Following that Huber, on September 24, 1954, filed its application covering its sale to Northern.

The jurisdiction of the Commission over a natural gas company conferred by Section 4(b) of the Act does not

depend on whether that company fulfills its obligation under 7(c) to obtain a certificate. There is nothing in 7(c) or any other part of the Act giving the slightest credence to that strange conception of the Commission's authority. On the contrary by Section 16 of the Act "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act." Huber was selling to Northern on February 7, 1942 and continued to do so through 1954 and down to and including the present time. As it now develops, jurisdiction by the Commission over independent producers was present in the Act throughout the period but it was not until the Supreme Court defined it in 1954 that the Commission considered itself justified in asserting that authority. There is no indication that its attitude prior to the Phillips decision was arbitrary or capricious and beyond doubt thereafter it functioned in accordance with the Supreme Court mandate. In the circumstances issuance of the application under Section 7(c) was within its authority. Petitioner's suggestion therefore that Section 7(e)[4] was the pertinent section under which to consider its application need not be examined at length. It is

[4] Section 7(e) reads:

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

sufficient to say that 7(e) on its face relates to new service and not to that in effect on February 7, 1942, the date of the amendment to Section 7(e). Irrespective of Section 7(e), under the law and facts petitioner's unwillingness to accept its certificate offers no real problem. The jurisdictional sections of the Act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(e). The pertinent amendments to the latter did not come into existence until almost four years after Sections 1(b) and 7(b) had been enacted. In Section 7(e) as amended there is nothing about the need of a gas company accepting a certificate. As we see it, with the certificate properly issued, Huber's attempted defiance of the Commission's rightful exercise of its authority is of no importance.

As part of its main theme that the T system is a gathering facility, petitioner states it is so considered in the industry. The basis for this is the testimony of R. C. Lister who made it plain that he was not attempting any legal characterization. The true test is the use and service of the valves and pipe.

Huber also makes some point of Northern being uncertificated with the view of distinguishing the facts from the Phillips situation. Whether Northern did obtain a certificate for its facilities beyond Huber's delivery place depends upon the interpretation of a Commission order which issued a certificate to Northern under Section 7(c) of the Act, 3 F.P.C. 767. The Presiding Examiner rightly determined that he for the Commission need not pass on that question in this proceeding. Even assuming absence of the particular certification, that is, as he stated, "* * * no legitimate ground for the Commission permitting Huber to abandon its sale to Northern."

Finally, petitioner attacks the power of the Commission under Section 7(b) to prevent it abandoning the Northern agreement as contrary to the Fifth Amendment.

It bases this on the statement that it is unwilling to undertake the obligations of a regulated natural gas company in connection with its production, gathering and disposition of gas from the leases involved.

In the light of the Phillips opinion the argument comes too late. It is now firmly settled that petitioner's business includes the sale of natural gas in interstate commerce for resale and so is controlled by the Commission. Section 1(a) which is the Act's declaration of policy leaves no doubt that such selling is within its scope. It reads:

> "As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

There is nothing in the record of argument to weaken the conclusion that selling natural gas for ultimate distribution to the public is affected with a public interest which makes federal regulation necessary.[5] Nor is there any sound indication that said business of Huber is not thus affected. Beyond question Congress has the power to regulate interstate commerce in natural gas.[6] And we are completely convinced that this includes authority to regulate

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[5] See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 582 (1942).

[6] Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944); Federal Power Commission v. Natural Gas Pipeline Co., supra.

abandonment of sales and of the facilities for sales. We think the sense of the Phillips decision is altogether opposed to permitting the Commission's control of sales to be nullified by the independent producer's abandonment of those sales at will. The money losses to distribution lines and to the ultimate consumers would be stupendous in actual equipment, etc., but a far greater loss would be the deprivation of the vital gas itself to the public. Eventually some sort of substituted service might be brought in at further cost and it in turn, because of opportunity for greater profit or the whim of the producer, might later abandon its sales. The resultant conditions need not be labored. The Commission under Section 1(a) above quoted has no greater duty than to prevent them.

Huber voluntarily entered into its contract with Northern. Though that agreement was prior to the statute, control legislation, including the abandonment clause, had been introduced the previous year.[7] The jurisdictional escape clause of the agreement strongly implies that the parties were alert to possible future express regulation.[8] In addition, and most important, service to the public was the foundation of the contract operation. That service was given. The public has relied on it through the years and is entitled to its fair continuance. To abandon it there must be Commission approval.

Apparently Huber could obtain more for its gas elsewhere. Whether it could or not the Commission will not force it to supply Northern at a confiscatory price. Actually there is a current proceeding before the Commission the purpose of which, as categorically stated for the Com-

[7] H.R. 5423, 74th Congress, introduced Feb. 6, 1935, Section 305(b).

[8] In Nebbia v. New York, 291 U.S. 502, 534 (1934), the Supreme Court said: "* * * if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

mission, is to deal fully and justly with petitioner's and Northern's rate problem.

The order of the Federal Power Commission will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,799

J. M. HUBER CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent

Present: MARIS and MCLAUGHLIN, *Circuit Judges,* and VAN DUSEN, *District Judge.*

Judgment

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of October 6, 1955 of the Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:
HARRIET G. HUMPHREYS
Deputy Clerk

August 31, 1956

Received & Filed Aug. 31, 1956 IDA O. CRESKOFF, *Clerk*

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4a–17a) is reported at 236 F. 2d 550. The decision of the Presiding Examiner, affirmed by the Commission (R. 29a–30a), is set out at R. 6a–29a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1956 (Pet. App. 18a). The petition for a writ of certiorari was filed on November 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTIONS PRESENTED

Petitioner, an independent natural gas producer, has been selling natural gas to Northern Natural Gas Company for resale to ultimate consumers in interstate commerce; these sales to Northern are admittedly subject to Federal Power Commission regulation. Part of petitioners' facilities used in making these sales were found by the Commission and the court below to have use only in connection with the sale and delivery of the gas to Northern. The questions presented are:

1. Whether Section 7 (b) of the Natural Gas Act applies to petitioner's proposed abandonment of these sales of natural gas to Northern.

2. Whether, in view of petitioner's unwillingness to continue the sales, the Commission properly issued a certificate of public convenience and necessity under Section 7 of the Act for petitioner's sales of gas to Northern which it has been making since before 1942.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set out in the Appendix to the petition at pages 1a–3a.

STATEMENT

By petition filed in the United States Court of Appeals for the Third Circuit, petitioner sought review of an order of the Federal Power Commission (1) refusing to authorize petitioner to abandon, under Section 7 (b) of the Natural Gas Act, sales of natural gas made by it to Northern Natural Gas Company

and (2) issuing a certificate of public convenience and necessity for such sales. The Court of Appeals affirmed (Pet. App. 4a–17a). The relevant facts may be summarized as follows:

Background.—Following this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, holding that the "wholesales of natural gas in interstate commerce" (*id.* at 682) are subject to regulation under the Natural Gas Act, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A, which superseded Order No. 174, but made no substantial change in the provisions here involved (19 F. R. 5081).

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining the class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. at 683, 684; 19 F. R. 5081). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations to individual hearings. The order required producers subject to the Act to file with the Commission, by

October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (19 F. R. 5081). When a large number of natural gas producers filed motions for rehearing and a stay of Order No. 174–A, the Commission denied all the requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions (R. 159a–160a). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (R. 160a). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B, and denied all applications for rehearing.[1]

The Present Case.—Petitioner, an independent producer of natural gas, has since 1936 sold and delivered natural gas produced by it to the Northern Natural Gas Company under a contract which was to continue in force for the term of petitioner's leasehold interest in its producing acreage and so long as gas is produced in paying quantities (R. 133a–146a).[2] The gas delivered under this contract is produced from 11 wells owned and operated by petitioner and transported at well-head pressure through its field pipeline system, which consists of two branches leading to a central delivery point where it passes through

[1] Excerpts from the provisions of Order No. 174–B, which for practical purposes is identical with No. 174–A, are set forth at pp. 159a–168a of petitioner's appendix in the court below.

[2] The remaining time is estimated as approximately ten years (R. 9a–10a).

a so-called "T" system into lines owned by Northern (Pet. App. 4a–5a).[3] Northern compresses the gas and then passes it to its main line transmission facilities where it continues in interstate commerce to the points of delivery for consumption by the ultimate consumers. The flow of gas from petitioner's wells to Northern's main transmission line is continuous and uninterrupted (R. 9a–13a).

In compliance with the Commission's regulations, petitioner, on September 24, 1954, filed, under protest, an application for a certificate of public convenience and necessity covering its Northern sales (R. 32a). On the same date, it also filed its Northern contract (as amended) as an initial rate schedule, pursuant to Section 4 (c) of the Act (R. 133a–146a). In addition, it simultaneously filed a "notice of cancellation" of the Northern rate schedule, requesting that the Commission "grant express permission and approval to the cancellation and abandonment of [the Northern] sale on March 1, 1955, pursuant to the terms and provisions" of the Northern contract (R. 150a–151a).

As justification for this proposed abandonment, petitioner relied upon a provision in its Northern contract permitting petitioner "at its election to cancel this agreement" in the event "any court or government regulatory body or agency having jurisdiction shall lawfully establish a price to be paid by Buyer for gas purchased from Seller hereunder different from that

[3] The "T" system which forms the point of connection between petitioner's and Northern's systems consists of two feet of stub pipe, connections, and to which are attached three valves which control the flow of gas from the two branches of petitioner's gathering system into Northern's transmission line (R. 10a, 157a).

fixed herein" (R. 143a–144a). Petitioner pointed out that Order No. 174–A required, pursuant to Section 4 (d) of the Act, that rate increases on jurisdictional sales could be made effective only after filing and approval by the Commission. Since petitioner had failed to apply for a rate increase to which it was entitled under its contract (based upon an increase in the Texas production tax on its sales) and hence could not put this increase into effect, petitioner argued that the Commission's regulations had established a price different from that provided for in the contract, and that accordingly it was entitled to cancel the contract[1] (R. 148a).

The Commission rejected petitioner's notice of cancellation "* * * insofar as it purports to effect an abandonment of a sale or service subject to the jurisdiction of the Commission without express permission and approval first had and obtained as required by Section (7) of the Natural Gas Act * * *" (R. 41a). The Commission, however, set the matter for hearing together with petitioner's original certificate application and Northern's complaint that the proposed abandonment would be contrary to the public interest (R. 41a–42a; see also R. 50a–53a).

Meanwhile, before these hearings were had, petitioner, on January 12, 1955, attempted to withdraw its application for a certificate of public convenience and necessity "to the extent that it may lawfully do so * * * and * * * to the extent that it is so permitted * * *" (R. 43a–44a). Alternatively, petitioner

[1] Without exception, the Commission has granted all applications for rate increases based on the increase in the Texas production tax (Pet. App. 6a).

undertook to amend the certificate application to state that it was filed under duress and that petitioner "is not willing to do the acts and perform the service proposed and is not willing to conform to the provisions [of Section 7 (e)] of the Natural Gas Act and the requirements, rules and regulations of the Federal Power Commission thereunder * * *" (R. 44a).[5]

Hearings and argument were then had, following which the Presiding Examiner issued his proposed decision (R. 6a–29a).[6] The Examiner held that petitioner's sales of natural gas to Northern since before February 7, 1942, constituted sales for resale in interstate commerce, subject to regulation under the Natural Gas Act (R. 13a, 26a, 27a); that the abandonment of these sales was subject to Section 7 (b) of the Act (R. 16a–22a, 27a); and that petitioner had not established that public convenience or necessity justified the abandonment of these sales (R. 25a–26a, 27a). He rejected petitioner's argument that the facilities used to make the Northern sales were also production and

[5] Following the hearings, petitioner also requested to be allowed to withdraw its "notice of cancellation" of its Northern rate schedule on the ground that it was not subject to the Commission's jurisdiction (R. 47a).

[6] After the hearings were completed, but before the Presiding Examiner had issued his decision, petitioner notified the Commission that it intended to stop deliveries to Northern on March 10, 1955 (Pet. App. 6a, 7a). The Commission thereupon sought and obtained in the United States District Court for the District of New Jersey a permanent injunction against petitioner's terminating its Northern service until completion of the administrative proceedings. *Federal Power Commission* v. *J. M. Huber Corp.*, 133 F. Supp. 479 (D. N. J.), appeal pending, C. A. 3, No. 11779. Further proceedings in this case have been suspended pending disposition of the instant case.

gathering facilities exempt from Commission regulation under Section 1 (b) of the Act, and that the Northern sales were therefore not made by means of any "facilities subject to the Commission's jurisdiction" as required by Section 7 (b) as a prerequisite to Commission jurisdiction over abandonments. The Examiner noted that "it is physically impossible to make a sale and delivery of natural gas without having facilities therefor" (R. 17a) and pointed to specific facilities (*i. e.*, the stub pipe, connections and the valves) used by petitioner solely for the purpose of making the requisite delivery (R. 19a–20a). He also rejected petitioner's further contention that, since it was unwilling to continue the Northern service, the Commission may not, under Section 7 of the Act, require it to continue the sales which it had been making since before 1942; the Examiner commented that acceptance of petitioner's position "would be to accord the recalcitrant person who has failed or refused to comply with the provisions of the Natural Gas Act an advantage over those who have fully complied during the years" (R. 21a). The Examiner accordingly refused to permit abandonment of petitioner's Northern sale and issued a certificate of public convenience and necessity therefor (R. 21a). The Commission, after argument, affirmed the decision of the Presiding Examiner in its entirety (R. 29a–30a).[7]

[7] While the matter was still pending before the Commission, petitioner filed with the Commission a unilateral rate increase on its Northern sales. This increase was suspended by the Commission and subsequently rejected on April 13, 1956, as violative of the Northern contract, on the authority of *United*

ARGUMENT

Petitioner admits that it is a natural-gas company generally subject to Commission regulation under the Natural Gas Act and it does not challenge the Commission's finding that neither the present nor future public convenience or necessity permits the abandonment of its sale to Northern. Nevertheless, petitioner continues to urge that Section 7 (b) of the Act does not apply to its proposed abandonment of the sale on the ground that all of its facilities are production or gathering facilities, exempt from Commission regulation under Section 1 (b) of the Act, and consequently that it has no facilities "subject to the Commission's jurisdiction" by which it makes these sales, as required in Section 7 (b). In addition, petitioner contends that, although it is a "natural-gas company" and has been selling the gas to Northern for resale since before February 1942, the Commission improperly issued a certificate of public convenience and necessity for the Northern sales since petitioner is now unwilling to continue the service.

Neither contention has merit. Both the requirement that petitioner obtain a certificate for its admittedly jurisdictional sales and the Commission's authority to approve abandonment of those sales are necessary corollaries of this Court's determination in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, that independent producers engaged in wholesale sales in interstate commerce are "natural-gas com-

Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U. S. 332. A Section 5 (a) investigation of petitioner's Northern rates was initiated on the same date.

panies," subject to Commission regulation under the Natural Gas Act. For if petitioner need not be certificated and can abandon its services at will, the Commission is denied the power to regulate it effectively. Moreover, the court below sustained the Commission's specific finding that petitioner made its Northern sales by means of particular facilities which, as a factual matter, were neither production nor gathering facilities, and hence the sales fell squarely within the narrowest reading of the language of Section 7 (b).

1. (*a*) The Natural Gas Act applies "to the sale in interstate commerce of natural gas for resale for ultimate public consumption," but not "to the production or gathering of natural gas" (Pet. App. 1a). This Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, held that wholesales in interstate commerce made by producers and gatherers of natural gas (the so-called "independent" producers) are subject to the Act, despite the fact that, aside from selling the gas, they engage only in production and gathering, both of which operations are in other respects not subject to the Commission's jurisdiction.

At the root of the *Phillips* decision was the Court's recognition that the "overriding congressional purpose [in enacting the Gas Act] was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business" (347 U. S. at 682–683; see Mr. Justice Frankfurter concurring, *id.* at 685–687). Concluding that the "jurisdic-

tion of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation" (*id.* at 681), the Court held that a sale of natural gas for resale in interstate commerce is not part of the gathering process which is subject to state control and exempted by Section 1 (b), since "production and gathering, in the sense that those terms are used in § 1 (b), end before the sales by [independent producers] occur" (*id.* at 678). See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 692–693. And in distinguishing between the sales in interstate commerce which are the end product of producing and gathering, and the "physical activities, facilities, and properties used in the production and gathering of natural gas" (*id.* at 678), this Court made it clear that the Section 1 (b) exemption did not cover every incident of the "business" of producing and gathering so as to make the sales an "integral part" of that business (*id.* at 681).

Petitioner's argument, that its gathering or collecting facilities are wholly within the Section 1 (b) exemption, even insofar as they are immediately used in connection with interstate sales which are admittedly subject to Commission jurisdiction and are necessary in carrying out those sales, is, as the court below pointed out (Pet. App. 9a), almost identical to the argument rejected by this Court in *Phillips* that the "business" of making sales in interstate commerce is exempt from regulation since, viewed from the economic standpoint, the sales, being the ultimate objective of production and gathering, came within the "production or gathering" exemption (347 U. S.

at 681). *Phillips* held that Congress intended the interstate sales of independent producers to be regulated effectively (see *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 520) and control over the abandonment of service is as much a normal incident of public utility regulation as is rate supervision.

Nevertheless, petitioner undertakes to distinguish between its sales, which admittedly are subject to regulation, and the physical means of delivery of the gas consummating the sale, which it insists is not. But Section 7 (c) of the Act (Pet. App. 1a–2a), as amended in 1942 (56 Stat. 83), requires certification of *any* facilities used in making jurisdictional sales of natural gas.[8] Section 7 (b) gives the Commission power to approve or disapprove abandonment of services "rendered" by means of "facilities subject to the jurisdiction of the Commission." Petitioner's position is not that none of its facilities is used in making its jurisdictional sales, but rather that all of its facilities are non-jurisdictional, since also used for production and gathering. However, there is nothing in the Act providing that facilities used by a natural gas company in connection with jurisdictional activities are wholly beyond the Commission's authority because also used for non-jurisdictional activities. The

[8] Since the present language of Section 7 (c) was added by amendment in 1942, it throws no direct light on the original intent of Congress in enacting Section 7 (b). The Act, however, must be interpreted by the courts (and applied by the Commission) as an internally consistent framework of regulation. Since 1942 it has expressly required Commission certification of "sales facilities".

accepted doctrine is to the contrary,[9] in line with this Court's edict that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690–691.

Moreover, it is clear that the Act, when read as a whole, gives the Commission sufficient authority over the facilities underlying any jurisdictional sale to allow effective regulation of that sale, and, as we have pointed out, when this Court in *Phillips* recognized that the Act applied to wholesales made by independent producers, it also recognized that the Commission's jurisdiction extended to the facilities underlying those sales to the extent necessary to permit effective regulation of the sales themselves. The premise underlying *Phillips* is articulated in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581. There, the Commission, in fixing the rates for interstate wholesale sales of an integrated pipeline

[9] *United States* v. *Public Utilities Commission*, 345 U. S. 295, 316–318; *Pennsylvania Water & Power Co.* v. *Federal Power Commisson*, 343 U. S. 414, 419–420; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 63–73; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 961–966 (C. A. 2), certiorari denied, 319 U. S. 741. While these cases arose under the Federal Power Act, the jurisdictional provisions of that Act and of the Natural Gas Act are substantially the same and have been so construed by the courts. *United States* v. *Public Utilities Commission*, 345 U. S. 295, 311; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, 479 (C. A. 7), certiorari denied, 345 U. S. 934; *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679, 682 (C. A. 9).

company, included the company's production and gathering facilities in the rate base. This Court, in sustaining the Commission's action over the pipeline's strenuous objection, stated that "[we] must read §1 (b) in the context of the whole Act" (324 U. S. at 602). When compared with the Act's other provisions dealing with the "normal conventions of rate making," the Section 1 (b) exemption was found to prohibit Commission control over the physical activity of producing and gathering itself ("the drilling and spacing of wells and the like") but not to "preclude the Commission from reflecting the production and gathering facilities in the rate base" (324 U. S. at 602–603). By parity of reasoning, the facilities underlying petitioner's sales may be "referred to" insofar as necessary to sanction control over abandonment of those sales.[10]

[10] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, on which petitioner relies, is not to the contrary. The question there was whether a pipeline could abandon, not the service made possible by its exempt gathering facilities, but other facilities underlying the service, consisting in that case of certain gas leaseholds. The leased acreage of which the company sought to dispose was undeveloped and thus remote from its current operations. This Court concluded that to extend the Commission's jurisdiction into what was an "essential part of production" (337 U. S. at 505) would be inconsistent with the "production and gathering exemption". Here, the facilities in question are immediately necessary in making the sales, and it is the sales themselves (admittedly subject to regulation) which petitioner seeks to abandon. A further distinction is that the States can and do regulate transfers of gas leaseholds (337 U. S. at 503) but not abandonment of interstate services.

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515, 531, on which petitioner also relies heavily (Pet. 22–23), appears inapposite, since the Court there did not

Further supporting the Commission's jurisdiction is the primary purpose of the Act which, as this Court recognized in *Phillips* (347 U. S. at 682–683), was to "plug the 'gap'" resulting from constitutional limitations on state regulation of the natural gas industry; the states do not, and cannot, undertake to regulate abandonment of interstate sales. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. at 681, 683; *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U. S. 44; see *Pennsylvania* v. *West Virginia*, 262 U. S. 553. Abandonments by independent producers which are otherwise subject to the Act can have as disastrous an effect on the public as cessation of service by a pipeline or an integrated company.[11] *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 693. As this Court recognized in *Phillips* (347 U. S. at 685):

> Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. * * *

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decide that the company's facilities were not subject to regulation, but only that the "local distribution" exemption in the Power Act must be accorded substantial effect. But compare *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 469–474; *Interstate Natural Gas Co.*, v. *Federal Power Commission*, 331 U. S. 682, 690–691. See also fn. 9, p. 13, *supra*.

[11] Petitioner's theory would lead to the anomalous result that, although independent producers as well as the pipeline companies are natural gas companies subject to the Act, Section 7 (b) would be applicable to abandonments only by pipeline companies.

(*b*) While we believe that Section 7 (b) clearly applies to an abandonment by an independent producer of any wholesale sale of gas in interstate commerce, there is an additional ground supporting the decision below. The Commission found, based on substantial evidence, that petitioner made the Northern sales by means of facilities not used for production and gathering and hence "subject to the jurisdiction of the Commission" within the meaning of Section 7 (b) (Pet. App. 10a–11a). The facilities in question were the "T" of valves and pipe (see the Statement, *supra,* pp. 4–5, 8) which connected petitioner's pipes with Northern's. The sole purpose of these facilities, as found both by the court and the Commission (R. 19a–20a; Pet. App. 10a–11a), was to provide means for delivering petitioner's gas to Northern pursuant to the sales contract. Were petitioner to put into effect its plan to terminate the Northern sales, undoubtedly it would either break the connection between its lines and Northern's pipe and disassemble the "T", or simply abandon use of those facilities. Since some of petitioner's facilities thus served no gathering or collecting function, but simply made possible the physical delivery of the gas to Northern, they were "sales" rather than "gathering" facilities, and as such subject to the Commission's jurisdiction under Section 7 (c) of the Act. These particular facilities provided a sufficient and unchallengeable basis for the Commission's jurisdiction over an abandonment proceeding under Section 7 (b) of the Act. See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689–693.

2. Petitioner further urges that, since it is unwilling to continue the Northern sales and Section 7 (e) is couched in terms of a "willing" seller, it was improper for the Commission to issue a certificate of public convenience and necessity for the sale. However, Section 7 (e) deals solely with new, prospective service ("service proposed") and is inapplicable here.

Rather, in issuing the certificate, the Commission relied on the proviso in Section 7 (c) for the issuance of so-called grandfather certificates to natural gas companies engaged in jurisdictional sales on February 7, 1942.[12] Petitioner admits that it was so engaged on February 7, 1942, but rests its attack on the ground that it had not applied for the grandfather certificate within 90 days of February 7, 1942, as required in the proviso (Pet. 30). Petitioner thus seeks to avoid regulation by relying on its own failure to comply with the Act as justification for its further non-compliance. As the Presiding Examiner stated (R. 21a):

> * * * To acknowledge such a principle would be to accord to the recalcitrant person who has failed or refused to comply with the provisions of the Natural Gas Act an advantage over those who have fully complied during the years. The law does not recognize any such advantage growing out of noncompliance. * * *

The circumstances surrounding the Commission's delay in asserting jurisdiction over petitioner are, of course, highly significant. Prior to this Court's

[12] The proviso, unlike Section 7 (e), does not require a Commission finding that the company is willing to provide the service.

decision in *Phillips,* it was uncertain whether independent producers of natural gas were subject to the Natural Gas Act. *Phillips* settled that question by holding that the producers had been under the Act from its inception. Congress, in providing the February 7, 1942, date and the 90-day filing provision in Section 7 (c), obviously had been thinking of companies which unquestionably were subject to the Act at that time, and it imposed upon them an obligation to continue their public utility service. Neither Section 7 (c) or 7 (e) contemplated the situation of a "natural gas company" operating without certification for many years, and then seeking to abandon its service at a time when its customers have made heavy investments in reliance thereon.

If the purpose of the proviso in Section 7 (c) as well as the general objectives of the Act are to be served, insistence upon literal compliance either with the 90-day provision or with the February 7, 1942, date would emasculate the proviso, as far as regulation of independent producers is concerned. Cf. *Cabell* v. *Markham,* 148 F. 2d 737 (C. A. 2), affirmed, 326 U. S. 404.[13]

[13] *Cabell* v. *Markham* involved the question of whether a claim to assets vested in the Alien Property Custodian during World War II was defeated by the proviso in Section 9 (e) of the Trading With the Enemy Act, prohibiting the allowance of such claims unless "owing to and owned to the claimant prior to October 6, 1917." Recognizing that, although the Act automatically became operative with the outbreak of World War II, the proviso as originally enacted had dealt with claims arising during World War I, both the Second Circuit and this Court refused to read the date requirement of the proviso literally and held that the pro-

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER,
WILLIAM W. ROSS,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Assistant General Counsel,

WILLIAM L. ELLIS,

HARRY L. ALBRECHT,
Attorneys,
Federal Power Commission.

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viso did not operate to bar World War II claims (326 U. S. at 409):

"* * * The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United States*, 143 U. S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

See also 148 F. 2d at 739.

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